

**603 KAR 2:015. Prequalification for construction; certificate of eligibility; and contract claims dispute.**

RELATES TO: KRS 45A.245, 176.090-176.110, 176.130-176.220

STATUTORY AUTHORITY: KRS 174.080, 176.140

NECESSITY, FUNCTION, AND CONFORMITY: KRS 176.140 authorizes the Department of Highways to determine the eligibility of bidders for construction contracts with the department. This administrative regulation is promulgated to provide a method by which the determination shall be made. This administrative regulation also establishes the hearing procedures for a contract claims dispute and denial, revocation, or limitation of certification.

Section 1. Definitions. (1) "Commissioner" means the Commissioner of Highways.

(2) "Cabinet" means the Transportation Cabinet.

(3) "Department" means the Department of Highways.

(4) "Division" means the Division of Construction.

(5) "Concurrence" means the agreement with the entire report and recommendation of the hearing examiner.

(6) "Dissent" means disagreement with a part or portions of the report and recommendation of the hearing examiner.

(7) "Contract" means a competitively bid contract between the contractor and the department pursuant to KRS Chapter 45A and 176.090 to 176.110.

(8) "Contractor" means the person, corporation, partnership or joint venture which enters into a contract with the department for highway maintenance or construction.

(9) "Maximum eligibility amount" means the maximum amount of uncompleted prime contract work permitted at any one (1) time.

Section 2. Certificate of Eligibility. (1)(a) A contractor bidding on a construction or maintenance project or accepting a subcontract on a construction or maintenance project of the Transportation Cabinet, Department of Highways, shall be prequalified and possess a certificate of eligibility issued by the department to bid on construction projects.

(b) The certificate shall state the maximum eligibility amount and types of work for which the contractor is qualified.

(c) The department may waive this requirement on a project not specifically involving the construction or maintenance of a public road in connection with the letting of a contract if the requirement is not mandated by KRS 176.130. The waiver shall be contained in the notice to contractors and the bid proposal for the project.

(2) The Commissioner of Highways shall appoint a construction prequalification committee composed of department employees to review each application and make a recommendation to the State Highway Engineer concerning the eligibility of a contractor to bid on a department construction or maintenance contract.

Section 3. Application for Certificate of Eligibility. A contractor desiring to procure a certificate shall submit, on the application and financial statement form TC-14-1, "Application for Certificate of Eligibility", December 1999 edition, provided by the department, information relating to the following:

(1) Ability to perform the types of work for which eligibility is requested.

(2) Construction experience resumes of the principal officers and key personnel of the contractor.

(3) Description of plant and equipment.

(4) Balance sheet and financial statement prepared as of the close of the last fiscal year or to reflect the current financial status of a newly established contractor.

(a) The financial statement of an applicant desiring eligibility in excess of \$1,000,000 shall be audited and attested by an independent public accountant or certified public accountant who holds a valid registration card from the Kentucky State Board of Accountancy or a registration card in the state in which the principal office of the contractor is located. The audit shall be made in accordance with the generally accepted auditing standards adopted by the membership of the American Institute of Certified Public Accountants. Standard audit forms and procedures shall conform with the institute's recommendations for the audit program of contractors. The accountant shall also comply with the specific instructions relative to the presentation of supporting detail requested by the department to determine the amount of net current assets available.

(b) The financial statement of an applicant desiring eligibility of \$1,000,000 or less shall be signed by the person preparing the statement and by a principal officer of the contractor.

(5) A "Certificate of Authority" if required by KRS 176.150(4).

Section 4. Confidentiality of Financial Information. In order to comply with KRS 61.878(1)(c) and KRS 176.210 the department shall not make available to the public the application information required in Section 3(3) and (4) of this administrative regulation.

Section 5. Method of Computing Maximum Eligibility Amount. (1)(a) The allowable net current assets as determined from the financial statement plus the cash surrender value, less loans, of life insurance on which the applicant is the beneficiary (exclude all policies with other beneficiaries) shall be multiplied by a factor of twelve (12) to establish the net current assets factor.

(b) The book value of owned equipment shall be multiplied by a factor of six (6) to establish the equipment factor.

(c) The equipment factor shall be added to the net current assets factor to determine the maximum capacity factor of the contractor.

(2) The contractor's percentage rating shall be established by the department by evaluating the contractor's organization and experience, plant and equipment and performance in accordance with the following maximum percentages:

(a) Organization and experience - twenty (20) percent;

(b) Plant and equipment - thirty (30) percent;

(c) Performance - fifty (50) percent.

(3)(a) The maximum eligibility amount shall be determined by multiplying the contractor's percentage rating and the maximum capacity factor.

(b) A contractor's current eligibility amount shall be the net difference between the contractor's maximum eligibility amount as shown on the certificate of eligibility issued by the department and the total value of uncompleted prime contract work charged to the contractor regardless of its location and with whom it may be contracted.

Section 6. Issuance of Certificate of Eligibility. (1)(a) The Construction Prequalification Committee shall review each application for a certificate of eligibility and make a recommendation of eligibility to the State Highway Engineer.

(b) The State Highway Engineer shall issue a determination of eligibility within thirty (30) days after receipt of the application unless the application is deferred as provided in Section 7(3) of this administrative regulation.

(c) Upon receiving a separate written request from a contractor not prequalified with the department indicating its intent to bid on a specific federal-aid project which has been advertised for a bid opening within the thirty (30) day period, the department shall review the application and

make a determination of eligibility within fifteen (15) calendar days.

(2) A certificate of eligibility shall terminate 120 days after the end of the applicant's fiscal year unless the certificate is suspended or revoked prior to that time. Ninety (90) days of this period is to permit the applicant to file a new application in accordance with Section 3 of this administrative regulation, thirty (30) days is for the department's review of the application and, if approved, the issuance of the new certificate of eligibility.

(3) The certificate of eligibility in effect as of the bid opening date shall constitute the basis for determining the eligibility of a bidder.

(4) An applicant may, in regard to the department's decision on its application:

(a) Request reconsideration of the department's decision in accordance with Section 7 of this administrative regulation; or

(b) Appeal the department's decision in accordance with Section 10 of this administrative regulation.

Section 7. Reconsideration of Decisions of Construction Prequalification Committee. (1)(a) An applicant may at any time request reconsideration of an application if the applicant is denied a certificate of eligibility or disagrees with the maximum eligibility amount or the types of work set forth in its certificate of eligibility by notifying the department in writing. An applicant may also request reconsideration of a department decision to suspend or revoke the certificate of eligibility or to reduce the maximum eligibility amount if the request is submitted in writing within ten (10) days after receipt of the notice of the department's action.

(b) A request for reconsideration shall clearly state the basis of the request and be supported by information and evidence which indicates why a certificate of eligibility should be issued or why the certificate of eligibility should be amended.

(c) The Construction Prequalification Committee shall review the request, may contact the applicant for clarification or expansion of the submitted information, and shall make recommendation to the State Highway Engineer.

(d) The Department of Highways shall notify the applicant of its determination within thirty (30) days after receipt of the request for reconsideration.

(e) If the Department of Highways does not concur with the reconsideration request of the applicant, the applicant shall be notified of his right to an administrative hearing pursuant to Section 10 of this administrative regulation.

(2) An applicant denied a certificate of eligibility may submit a new application if factors constituting the basis for the issuance of a certificate of eligibility warrant reconsideration. The department shall consider the new application and notify the applicant of the action taken within thirty (30) days after receipt of the application.

(3)(a) An application which is deferred by the department until the applicant settles outstanding debt to the Commonwealth, completes a project, or satisfies prior concerns about work performance on a project shall remain in the possession of the department until the time that the reason for deferral is resolved to the satisfaction of the department.

(b) The department shall then take action on the deferred application to issue or deny a certificate of eligibility.

(c) The applicant submitting an application, which is deferred, shall be notified of the deferral within ten (10) days after action is taken by the department to defer the application. The applicant shall be notified pursuant to Section 10 of this administrative regulation of his right to an administrative hearing regarding the deferral.

(4) An interim application may be submitted if there has been a substantial increase in the net current assets of the applicant and the applicant wishes to apply for an increase in the maximum eligibility shown on the certificate of eligibility. The interim application shall contain a financial

statement certified in the same manner as statements prepared as of the close of the fiscal year. The department shall review the interim application and notify the applicant of its determination within thirty (30) days after receipt of the application.

(5) A certificate holder, upon receipt of a certified mail request from the department, shall submit an interim financial statement or current information relating to the applicant's organization, equipment and work status. The information requested shall be submitted within thirty (30) days after receipt of the request. Failure to provide the information requested shall constitute a basis for the suspension or revocation of a certificate of eligibility.

(6) An applicant may request an administrative hearing if the applicant is denied a certificate of eligibility, his application is deferred, or the applicant disagrees with the maximum eligibility amount or the types of work set forth in its certificate of eligibility by notifying the department in writing within ten (10) days after receipt of its denial or certificate of eligibility. The department shall hold an administrative hearing pursuant to the provisions of Section 10 of this administrative regulation.

Section 8. Revocation of Certificate of Eligibility or Reduction of Maximum Eligibility Amount. (1) Upon receipt of information or evidence that a holder of a certificate of eligibility has failed to perform satisfactorily or adhere to the laws, administrative regulations, or specifications applicable to a contract or subcontract, the department may take action to suspend or revoke the certificate of eligibility or to reduce the maximum eligibility amount.

(2) A notice to the certificate holder, setting forth the grounds on which the action is proposed, shall be sent by certified mail.

(3) The proposed action shall become final unless the certificate holder submits a written request for a reconsideration pursuant to Section 7 of this administrative regulation or an administrative hearing within ten (10) days after receipt of the notice.

(4) If the certificate holder requests an administrative hearing, the department shall hold this hearing in accordance with the provisions of Section 10 of this administrative regulation.

Section 9. Administrative Claims Process. (1) The cabinet shall not consider a claim for extra work as defined in the edition of the standard specifications for road and bridge construction applicable to the contract between the cabinet and the contractor unless the contractor has submitted form TC 63-32, "Notice of Changed Condition/Disagreement", December 1999 edition, to the resident engineer before beginning the disputed work.

(2) Any other claim not referenced in subsection (1) of this section that a contractor shall possess against the cabinet for compensation shall be submitted in writing on form TC 63-32, "Notice of Changed Condition/Disagreement", to the resident engineer within ten (10) days of the date of which the contractor knew or should have known of the existence of said claim. Any claim presented after said ten (10) days shall not be considered for payment by the cabinet. After receipt of TC 63-32, "Notice of Changed Condition/Disagreement", the cabinet shall respond to the contractor with form TC 63-33, "Acknowledgement of Notice of Changed Condition/Disagreement".

(3) If a contractor has a contract claim or requests relief from the cabinet, the contractor shall exhaust the administrative process within the cabinet as set forth below prior to requesting an administrative hearing.

(a)1. For claims involving extra work, the contractor shall submit his claim in writing, setting forth the amount in dispute, the basis of the claim and any supporting documentation of said claim to the resident engineer not later than thirty (30) days after receipt of the "Final Inspection and Formal Acceptance Report of Completed Construction", Form TC 63-44.

2. For claim disputes involving final quantities and payments, the contractor shall submit his

claim in writing setting forth the amount in dispute, the basis of the claim and any supporting documentation of said claim to the resident engineer not later than sixty (60) days from the date of the "Final Release" (Form TC 63-34) sent by the cabinet.

(b) The resident engineer in consultation with the district transportation engineering branch manager for construction and the contractor shall attempt to resolve the dispute with the contractor. The resident engineer shall have sixty (60) days from the date of receipt of written notice of a formal claim to resolve the dispute.

(c) Should the claim not be resolved by the resident engineer, then the claim shall be submitted to the Director, Division of Construction, who shall have ninety (90) days to make the final determination.

(d) If the matter is not resolved by the resident engineer and the contractor and prior to making a final determination on the matter, the Director, Division of Construction, shall convene an informal settlement conference with the contractor for the purpose of either settling the dispute or identifying the issues which need resolution. If the settlement conference is unsuccessful, the Director, Division of Construction, shall notify the contractor in writing of the cabinet's decision regarding the contractor's claim. Said notification shall inform the contractor of his rights to an administrative hearing pursuant to Section 10 of this administrative regulation.

(e) Should the resident engineer or the Director, Division of Construction, fail to render a decision within the time limits set forth in this administrative regulation, said inaction shall be deemed a denial of the claim by the cabinet and the contractor may proceed with the administrative hearing process pursuant to Section 10 of this administrative regulation. Further, should the Director, Division of Construction, fail to render a decision in the time frame previously stated, the cabinet shall bear all costs associated with the hearing officer.

(f) The contractor shall request an administrative hearing pursuant to KRS Chapter 13B within thirty (30) days of the date of the notification of the decision by the cabinet.

(g) Upon the agreement in writing of both parties, the parties may engage in formal nonbinding mediation of the dispute with a mediator agreeable to both parties. The parties participating in the mediation shall each pay one-half (1/2) of the costs associated with the mediator.

(h) If mediation is agreed upon by the parties, the formal administrative process that culminates with a KRS Chapter 13B hearing and all time limits therein shall be stayed until the cabinet or the contractor submits written notice to the other that they are terminating the mediation process. The time limits previously stayed shall commence to run upon the date of the written notice.

Section 10. Hearing Procedure. (1) A request for an administrative hearing pursuant to the provisions of this administrative regulation shall be in writing and mailed to the State Highway Engineer, Department of Highways, 501 High Street, 10th Floor, State Office Building, Frankfort, Kentucky 40622.

(2) Upon receipt of a request for an administrative hearing, the State Highway Engineer shall forward the request to the Office of General Counsel and Legislative Affairs for proceedings in accordance with the provisions of KRS Chapter 13B. Failure to submit a written request for an administrative hearing to the State Highway Engineer within thirty (30) days of the date of the decision by the Director, Division of Construction, shall be ground to summarily deny the request for hearing and the decision by the Director, Division of Construction, shall stand.

(3) If a hearing is commenced, the hearing examiner shall prepare and submit his report with a recommendation to the Secretary of Transportation through the Office of General Counsel and Legislative Affairs.

(4) The secretary, after receiving the report and recommendation of the hearing examiner, may accept the report and recommendation in its entirety, or reject or modify any or all of the findings and recommendations of the hearing examiner as set out in a final order pursuant to KRS Chapter

13B.

(5) The contractor shall be notified by Final Order of the secretary's decision.

(6) The contractor shall have appeal rights pursuant to KRS Chapter 13B.

(7) The contractor shall reimburse the cabinet one-half (1/2) of the expenses of the hearing officer within thirty (30) days after the date of the entry of the final order by the Secretary of Transportation. The cabinet may withhold any sum owed a contractor on a current or future project that the cabinet is owed for the costs and/or expenses of the hearing officer.

Section 11. Material Incorporated by Reference. (1) The following material is incorporated by reference:

(a) Transportation Cabinet form TC 14-1, "Application for Certificate of Eligibility", December 1999 edition;

(b) Transportation Cabinet form TC 63-32, "Notice of Changed Condition/Disagreement", December 1999 edition;

(c) Transportation Cabinet form TC 63-33, "Acknowledgment of Notice of Change Condition/Disagreement", December 1999 edition;

(d) Transportation Cabinet form TC 63-34, "Final Release", March 1998 edition; and

(e) Transportation Cabinet form TC 63-44, "Final Inspection and Formal Acceptance Report of Completed Construction", November 1997 edition.

(2) All material incorporated by reference as a part of this administrative regulation may be viewed, copied, or obtained from the Transportation Cabinet, Department of Highways, Division of Contract Procurement, 501 High Street, Frankfort, Kentucky 40622. The office hours are 8 a.m. to 4:30 p.m. on weekdays. The office telephone number is (502) 564-3500. (HIWA-CE; 1 Ky.R. 809; eff. 5-14-75; Am. 3 Ky.R. 538; eff. 3-2-77; 5 Ky.R. 686; eff. 8-6-80; 11 Ky.R. 1869; eff. 7-9-85; 14 Ky.R. 171; eff. 9-10-87; 1645; eff. 3-10-88; 23 Ky.R. 1014; 1596; eff. 10-1-96; 26 Ky.R. 1700; eff. 5-22-2000.)